In the

Supreme Court of the United States

October Term—1948

No. 170

ESTATE OF FLORENCE ALTHEA GIBB, deceased, ALTHEA GIBB HUNTER, MALCOLM DU BOIS HUNTER, and CHARLES S. McVEIGH, executors,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Althea Gibb Hunter, Malcolm Du Bois Hunter, and Charles S. McVeigh, executors of the estate of Florence Althea Gibb, deceased, respectfully pray that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on April 23, 1948 affirming a decision and order of The Tax Court of the United States which affirmed a determination by the respondent that there exists a deficiency in Federal estate taxes in the amount of $669,950.89 with respect to the said estate.

OPINIONS BELOW

The findings of fact and opinion of the Tax Court were entered on May 20, 1946 and are reported in 6 T. C 1088 (R. pp. 222-229). The order of the Tax Court was filed on July 8, 1946 (R. p. 230).

The opinion of the Circuit Court of Appeals (R. p. 242) was filed on April 23, 1948 and is reported in 167 F. (2d) 633.

JURISDICTION

The opinion and decree of the Circuit Court of Appeals sought to be reviewed were entered April 23, 1948 (R. pp. 242-243). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (28 U. S. C. A. Section 347 (a)).

STATUTE INVOLVED

The statute involved is Section 302 (c) of the Revenue Act of 1926, which with the Regulations applicable thereto, appears in the appendix.

QUESTIONS PRESENTED

1. Whether the tax law requires that an estate shall be subjected to an additional estate tax of $669,950.89 merely because the decedent, who had transferred property in trust prior to March 3, 1931, might have designated, by her will, alternate remaindermen to take the property in certain contingencies beyond her control. On an actuarial basis the value of such right was less than $1000.

2. Whether *May* v. *Heiner,* 281 U. S. 238 (1930) and subsequent decisions stand in the way of including in the

gross estate of the grantor the value of the corpus of a trust, created on March 10, 1930, under the terms of which the grantor reserved the income therefrom to herself for life, a question similar to those upon which this Court has directed argument in two other cases.

3. Whether the applicable statute imposes estate tax on the value of the corpus of an *inter vivos* trust merely because the grantor provided that, upon her death and the death of the secondary life beneficiary, the trust should terminate and the corpus thereof be distributed to designated remaindermen then surviving, such remaindermen being in existence at the time the trust was created.

4. Whether, assuming that regardless of the grantor's efforts to make a completely irretrievable gift there arose a possibility of reverter by operation of law, the applicable statute requires that the value of such property be included in her gross estate.

5. Whether, for the assistance of the Appellate Courts, in applying a statute which depends upon intent, the Tax Court was not required to make findings of fact as to the actual intent of the grantor, established by undisputed and overwhelming evidence, rather than to disregard such evidence entirely, and rely, at most, upon a theoretical intent directly contrary to that established by the evidence.

STATEMENT

This proceeding was instituted in The Tax Court of the United States (R. pp. 1-12) and resulted in an opinion and decision by that Court, affirming the determination of the

respondent that there exists a deficiency with respect to the Federal estate tax of this estate in the amount of $669,950.89 (R. pp. 222-229). The facts involved in the proceeding, which were submitted by means of a written stipulation (R. pp. 16-51), oral testimony and documentary evidence (R. pp. 52-221), may be briefly summarized as follows:

Florence A. Gibb, the decedent, by Indenture dated March 10, 1930, created a trust of approximately $1,000,000 (R. p. 16). The Indenture provided: that the income should be paid to the grantor, and upon her death to her daughter, Mrs. Althea Gibb Hunter; that upon the death of Mrs. Hunter the principal should be distributed to her issue; that if upon the death of the grantor Mrs. Hunter were deceased, the trustees should divide the trust estate into shares for the issue of Mrs. Hunter, holding in trust the shares of children living at the date of the Indenture with the principal being payable at death to their issue or to the issue of Mrs. Hunter, and paying over outright the shares of any other children or of any issue of a deceased child; and that in the event all issue of Mrs. Hunter predeceased her, or if no issue were alive at the termination of any trust created for her children, the trust estate should be paid to those entitled to receive the same pursuant to those provisions of the grantor's will which should dispose of her residuary estate "under such conditions" (R. pp. 39-51).

Article "Twelfth" of the will of Florence A. Gibb covered the disposition of her residuary estate if she were survived by her daughter and grandchildren. Her will made no provision for the distribution of her residuary estate under the circumstances upon which the corpus of

the trust under the Indenture could pass to alternate remaindermen named in her will (R. pp. 21-25).

Florence A. Gibb died on May 17, 1941, a resident of Nassau County, New York, and her Last Will and Testament dated January 17, 1938 was there duly admitted to probate. Petitioners herein, her executors, filed a Federal Estate Tax return which did not include the value of the securities comprising the trust (R. pp. 16-17). Thereafter respondent sent a statutory notice of Estate Tax deficiency of $669,950.89 (R. pp. 8-9), based on his determination that the transfer made to the trust was intended to take effect in possession or enjoyment at or after Mrs. Gibb's death, and that therefore the value of the trust property was includible in her gross estate (R. pp. 10-12). Petitioners filed a petition to review that determination with the Tax Court, and the case was heard by that Court in New York City. Petitioners presented oral and documentary evidence which established that the true intention of the decedent was directly contrary to that assumed by the respondent (R. pp. 16-221).

Testimony was presented by three witnesses who were completely familiar with the grantor's business and financial affairs (R. pp. 57-80). This established the very strong bond of affection between the grantor and her daughter and her four young grandchildren and that her sole purpose in creating the trust was to make adequate and independent provision for their protection in the event anything should happen to her investments, which were largely in a mercantile establishment, at the beginning of the depression. Prior to the creation of the trust she stated that she intended "to give away" $1,000,000 and after its creation she stated that she "had given away" $1,000,000, that

she could not afford "to give away any more" at that time, that she had created an irrevocable trust, that she had no further interest in it and that she could neither change it nor exercise any control over it. Statements of her securities submitted to her after the trust was created did not include those transferred to the trust. She dismissed as "a very foolish idea" any thought that either her daughter or her grandchildren might predecease her.

The Tax Court affirmed the determination of the respondent (R. pp. 222-230), without giving any consideration, either in its findings of fact or opinion, to the evidence of intention offered by petitioners.

Appeal was taken to the United States Circuit Court of Appeals for the Second Circuit (R. pp. 231-238), which affirmed the decision of the Tax Court. The Circuit Court of Appeals merely based its decision, *per curium*, on two cases (*Fidelity-Philadelphia Trust Company* v. *Rothensies*, 324 U. S. 108 (1945) and *Commissioner* v. *Estate of Bayne*, 155 Fed. (2d) 474 (C. C. A. 2, 1946)) both of which are distinguishable. This decision appears to be in direct conflict with the decision by the Third Circuit in *Commissioner* v. *Estate of Church*, 161 F. (2d) 11 (C. C. A. 3, 1947) (No. 96) now pending before this Court and assigned for reargument.

ARGUMENT

I. The Reservation of Income to the Grantor for Life Did Not Render the Trust Property Taxable Under the Applicable Statute As So Far Construed.

In this case the decedent created a trust, reserving to herself the income for life, making elaborate provisions to assure that the trust should benefit her daughter and four grandchildren and retaining the right (which she did not

exercise) to designate alternate remaindermen only in the event those designated in the trust instrument should predecease her. Largely because of this retained right, so remote that it was established to have an actuarial value of less than $1,000, the decedent's estate, under the decision below, must pay an additional estate tax of $669,950.89. Application of the correct statute, properly construed, requires no such incongruous result.

Although the opinion of the Tax Court quotes the statute as it was at the time of decedent's death, including certain amendments thereto which were enacted after the trust was created, and thus that Court may well have applied the wrong statute, the decisions of this Court so far show that the trust estate was not taxable merely because the grantor reserved the income to herself for life. *May* v. *Heiner, supra,* is controlling on that score and the subsequent amendments embodied in the statute as quoted by the Tax Court (R. pp. 226-227) have been held inapplicable to trusts created prior to March 3, 1931. But this Court has recently assigned two cases for reargument (*Commissioner* v. *Estate of Church, supra* and *Estate of Spiegel* v. *Commissioner,* 159 F. (2d) 257 (C. C. A. 7, 1947) (No. 52)) and has requested discussion of certain questions relative to the applicable statute and to the validity of *May* v. *Heiner* and *Hassett* v. *Welch,* 303 U. S. 303 (1938) in the light of subsequent authority. As the *Church* decision appears to be in conflict with the instant decision the present petition should be granted not only to resolve the conflict but also to present other facets of the important questions upon which this Court has requested reargument. The granting of certiorari here is particularly appropriate since the Tax Court's quotation of the statute as amended suggests that it may have brushed over too lightly the knotty

problems which are involved in the questions upon which reargument has been directed. If *May* v *Heiner* and the cases which treat it as still authority as to trusts created prior to March 3, 1931, are to be overruled, so that the trust estate here is taxable because the grantor reserved income to herself for life, that should not be accomplished *sub silentio* by the Tax Court but only after consideration of the question in this case, along with the others now pending in this Court. Some of the difficulties standing in the way of such a result may be mentioned.

Prior to March 3, 1931, and at the time the transfer here in question was made, the applicable statute (Section 302 (c) of the Revenue Act of 1926), in so far as material to this proceeding, reads as follows:

> "* * * To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

In *May* v. *Heiner, supra,* this Court held that a transfer in which the decedent had reserved the income for life was not taxable as a transfer intended to take effect at death under the statute as it then read. The Government having unsuccessfully attempted to secure a reversal of *May* v. *Heiner,*[1] a joint resolution was drafted and was passed by Congress on March 3, 1931. This resolution amended Section 302 (c) by inserting after the word "death" an additional clause reading as follows:

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[1](*Burnett* v. *Northern Trust Company,* 283 U. S. 782 (1931); *Morsman* v. *Burnett,* 283 U. S. 783 (1931); *McCormack* v. *Burnett,* 283 U. S. 784 (1931)).

"* * * including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property, or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;"

The amendments so made, as amplified in later Revenue Acts, are included in the portion of Section 811 (c) of the Internal Revenue Code apparently relied upon by the Tax Court. However, the Treasury Department itself has consistently recognized that the Joint Resolution of March 3, 1931 should not be given retroactive effect. First, on May 22, 1931, T. D. 4314, X-1 C. B. 450 was issued stating that the amendments to Section 302 (c) would "be applied prospectively only to such transfers coming within the amendments as were made after 10:30 P. M., Washington, D. C. time, March 3, 1931." Later, Regulations 70 were amended by T. D. 4336, XI-1 C. B. 329, so as to provide, in part, that the amendments applied only to transfers made after the passage of the joint resolution. Any possible doubt as to the application of the amendments was removed by this Court's decision in *Hassett* v. *Welch, supra,* wherein it was determined that the amendments in question were prospective only in their application and did not control transfers made prior to the passage of the joint resolution.

After this Court's decision in *Helvering* v. *Hallock,* 309 U. S. 106 (1940), there apparently was some question as to whether *Hassett* v. *Welch* and *May* v. *Heiner* had been overruled. But the issue involved in the Hallock case was entirely different from those involved in the other two cases. In *Hassett* v. *Welch* the sole question was whether transfers made prior to March 3, 1931 were governed by the amend-

ment made on that date. In *Helvering* v. *Hallock* (involving five cases), this Court considered only the question of estate tax liability with respect to trust property when the grantor provided that the property would revert to him should he survive the life beneficiary, and did not extend its opinion to any of the matters considered in *May* v. *Heiner* or *Hassett* v. *Welch*. The dissenting opinion in *Helvering* v. *Hallock* cites *Hassett* v. *Welch* as continuing authority. It has been so considered in lower courts. See, e.g., *Commissioner* v. *Halls Estate, et al.,* 153 F. (2d) 172 (C. C. A. 2, 1946); *Commissioner* v. *Irving Trust Company,* 147 F. (2d) 946 (C. C. A. 2, 1945); *Commissioner* v. *Estate of F. M. Singer, et al.,* 161 F. (2d) 15 (C. C. A. 2, 1947); and *Helvering* v. *Proctor,* 140 F. (2d) 87 (C. C. A. 2, 1944).

While most of the controversy as to the effect of the amendments was concerned with the reservation of a life estate, the amendments covered also the reservation of a power to designate persons to enjoy the property, and the Courts have held that the amendments are not retroactive with respect to the latter any more than with respect to the former. See, e.g., *Helvering* v. *Proctor, supra.*

If *May* v. *Heiner* and *Hassett* v. *Welch* are now to be reconsidered and possibly overruled by this Court, petitioners should be given an opportunity to present argument against that result here, since the same questions are to be argued in other cases, one of which seems to involve a conflict with the decision below.

II. No Property Interest Passed Upon the Grantor's Death within the Meaning of the Applicable Statute.

It is immaterial that the reservation of a life estate by the grantor necessarily postponed actual enjoyment of the

trust property by her daughter and grandchildren, because it has been determined that the applicable statute contemplates ultimate possession and enjoyment rather than a present right thereto. Upon creation of the trust, the enjoyment of the trust estate by her grandchildren or their issue was no less definite or certain than at the grantor's death. Thus, her death was not intended to, could not, and, in legal effect, did not, create, destroy, increase or diminish any subsequent estate in the trust property. Where the death of the grantor has no effect upon the vesting of an interest in property but rather where such vesting of interest is complete as soon as the trust is created, the applicable statute indicates no purpose to tax such a completed gift. *Reinecke* v. *Northern Trust Company,* 278 U. S. 339 (1929); *May* v. *Heiner, supra.* In fact, the Circuit Court of Appeals for the Second Circuit recently stated in *Commissioner* v. *Estate of F. M. Singer, et al., supra,*

> "as a matter of fact, once we have decided not to repudiate *May* v. *Heiner,* the decedent's death fades into insignificance as an event enlarging or shifting the estates of the grantees; and only in a highly legalistic way can it be considered to bring about 'their transmission from the dead to the living'. The children all had their vested interests. * * *"

Similarly, in *Jennings* v. *Smith,* 161 F. (2d) 74 (C. C. A. 2, 1947), where the grantor-trustee of a trust had the power to distribute income only if necessary to support the beneficiary in comfort, and the power to invade principal only in the event of illness or financial misfortune of the beneficiary, the Court held that, because the grantor had imposed conditions upon the exercise of his rights and the contingencies which would permit him to exercise them

had not happened before his death, the value of the trust corpus was not includible in his gross estate. See also *Helvering* v. *Proctor, supra; Estate of Milton J. Budlong,* 7 T. C. 756 (1946); and *Estate of William Stewart Spaulding,* T. C. Memo Op. Dkt. No. 109860 entered March 30, 1944 (3 T. C. M. 294).

Both the Tax Court and the Court below relied on the *Stinson* case (*Fidelity-Philadelphia Trust Company* v. *Rothensies, supra*), as authority for their decision in the instant case, and in doing so disregarded important distinctions. In the *Stinson* case, the decedent created a trust in 1928, reserving the income to herself for life and naming her two daughters, aged ten and twelve, respectively, as life tenants after her death. Upon the death of the daughters, their respective shares were to be paid to their issue and, in default thereof, to the persons named in the decedent's will. In the event of her failure to name such persons in her will, the corpus was to be paid to certain charities designated in the trust instrument.

No children were born to the daughters until after the grantor's death; accordingly, from the time of creation of the trust until after the grantor's death, there were indeterminate estates which could attain substance only by the birth of issue to the daughters or by the grantor's failure to exercise her power of appointment. That the grantor was well aware of this situation is evidenced by the fact that she exercised the power of appointment and named alternate remaindermen. At the time of her death, the power so exercised was effective to pass the property and could be defeated only by the subsequent birth of issue to her daughters. The exercise of the retained power was clearly indicative not only of the grantor's continued dominion over

the property, but also of her intent that the rights of the remaindermen should not vest until at or sometime after her death.

In the instant case, the death of the grantor was not the event which fixed the interests in the trust property. Upon creation of the trust, the rights of the remaindermen became clearly defined and could not be altered or defeated by any act of the grantor. So far as the grantor was concerned, the transfer was complete at the moment the indenture was executed, and it was only by the happening of a subsequent event over which she had no control that she would become entitled to exercise any further powers with respect to the trust. The extremely contingent nature of the condition subsequent upon which was based her right to exercise a further power, coupled with her failure to attempt to exercise it, is a clear example of a transfer intended to take effect when made.

The instant case is more analogous to *Commissioner* v. *Estate of F. M. Singer, et al., supra,* than it is to the *Stinson* case. In the *Singer* case, the Commissioner's claim of taxability was based not on the fact that the grantor had retained a power of appointment which he exercised during his life, but on the contention that, if the appointees of the property predeceased the grantor, he could have made further appointments. But this was regarded as too remote a contingency upon which to hang the tax. The right to exercise a power in the instant case was equally remote and contingent, although more general than in the *Singer* case. The important factor in determining whether a transfer is made in substitution of a testamentary disposition should be the circumstances under which a further power may be exercised over the property, not the manner in which the power may be exercised once those circumstances have occurred.

III. Taxation Should Not Be Based Upon the Existence of a Remote Possibility of Reverter By Operation of Law.

It has become a truism that the nice distinctions of the law of conveyancing do not control Federal taxation. If such distinctions cannot be relied upon to defeat the Government's right to levy and collect a tax, they can hardly be regarded as a proper basis for an opposite result. Certainly, here, it would strain Congressional intent infinitely to predicate imposition of a large tax upon the remote and unanticipated contingency that there might be some slight possibility of reverter if all the young beneficiaries of this trust should predecease the aged grantor.

The evidence presented to but disregarded by the Tax Court clearly indicated that the grantor thought she had done everything within her power to divest herself completely of any further interest in or control over the trust property. The exercise of further power involved a contingency "too remote to bring this *inter vivos* transfer within 302 (c). Not to recognize the distinction which remoteness creates would be to hold that every *inter vivos* trust is subject to the estate tax, since it would be nigh impossible to negative the reversion of the corpus as a matter of law upon failure of the trust under every conceivable contingency. * * *" *Fifth Avenue Bank of New York* v. *Nunan,* 59 F. Supp. 753 (D. C. E. D. N. Y., 1945).

This same realistic approach to the problem was adopted in *Commissioner* v. *Estate of F. M. Singer, et al., supra,* where the Court did not hold that the existence of the retained power amounted to a possibility of reverter, but, rather, held that it "seems far from the type of disposition at which the statute is directed."

Commissioner v. *Bayne's Estate, supra,* cited by the Court below in its *per curium* opinion, does not appear to be dispositive of the issue. There, the grantor, who had no children at the time, created a trust, reserving the income to himself for life and providing that upon his death the corpus should be paid to his surviving children or their issue and, in default thereof, to his surviving brothers and sisters, or their issue. The Court held that, because all named remaindermen might conceivably predecease the grantor, there was a technical possibility that the property might revert to the grantor or his estate under applicable English law. Taxation of the trust corpus was apparently based on this holding.

Although in the Bayne case there may have been a technical possibility of reverter under English law, the Court did not particularly consider whether there was such a possibility under New York law. That would be the applicable law here but the question was not presented by respondent to nor considered by the Tax Court as it should have been if decision could turn upon it. It is at least doubtful whether there is a possibility of reverter under New York law. Cf. *City Bank Farmers Trust Co.* v. *Miller,* 278 N. Y. 134 (1938). Certainly the Appellate Courts should have the benefit of the consideration of that question by the Tax Court. Furthermore, in the instant case, the interests of the four named remaindermen appear to have been vested upon creation of the trust, subject only to being defeated if they or their issue did not survive the survivor of the grantor or her daughter, or to being reduced in the event of the birth of additional children to their mother.

Commissioner v. *Estate of Church, supra,* now pending before this Court and set for reargument, appears to be

opposed to and in conflict with the *Bayne* case and the decision below based on *Bayne*. There, the Circuit Court of Appeals for the Third Circuit held that a possibility of reverter by operation of law would not support the imposition of an estate tax upon the corpus of the trust.[1] Certiorari should be granted here to resolve the conflict, especially in view of the further questions to be argued in the *Church* case and the aid which their consideration in this case, as well, may give the Court.

IV. The Grantor Did Not Intend That the Transfer Should Take Effect in Possession or Enjoyment At or After Her Death but the Tax Court Failed to Provide Findings As to Intent.

The intent of the grantor is the statutory touchstone, and a determination of this intent requires consideration of all the surrounding circumstances (*Tex-Penn Oil Company* v. *Helvering,* 300 U. S. 481 (1937); *United States* v. *Phellis,* 257 U. S. 156 (1921); *Phelps* v. *Commissioner,* 54 F. (2d) 289 (C. C. A. 7, 1931). As indicated in the Statement, *supra,* petitioners offered undisputed evidence as to the intent of the grantor which required decision in their favor but the Tax Court disregarded it and made no findings with respect to it. Previous decisions against taxpayers, where no such compelling proofs were tendered did not relieve the Tax Court of the duty to make findings of fact sufficient to enable a reviewing court to determine whether there was an error of law.

[1]It should be noted that in its most recent decision, *Emma L. Keck* estate 10 T. C. No. 144 (Dkt. No. 14534 promulgated June 15, 1948) the Tax Court refused to follow the *Bayne* case and held, as was held in the *Church* case, that a mere possibility of reverter by operation of law did not justify the imposition of the tax.

The deference due the findings of fact of the Tax Court under *Dobson* v. *Commissioner,* 320 U. S. 489 (1943), depends upon that Court's making proper findings of fact or the whole process of limited review is frustrated. When there are adequate findings the appellate courts may then properly limit themselves to reviewing questions of law. See, e.g., *Trust of Bingham* v. *Commissioner,* 325 U. S. 365 (1945). But they can hardly discharge that function where, as here, they have no light as to how the Tax Court appraised the evidence. At the very least this case should have been remanded for proper findings.

The Tax Court may not arbitrarily disregard convincing testimony. *Kroger, et al.* v. *Commissioner,* 145 F. (2d) 901 (C. C. A. 6, 1944). Its duty is to hear and sift all the evidence and make complete findings of fact based on all the evidence submitted to it. It must find specifically the facts relating to the questions before it and it must designate in its opinion the facts upon which it bases its conclusions of law. Without specific findings of fact, there is no foundation upon which conclusions of law can be based, and there would seem to be no adequate basis to advise the Appellate Court as to the true grounds for the Tax Court's decision. If the Tax Court fails in this duty, the Appellate Court should either reverse the Tax Court's decision or remand the case to the Tax Court for further proceedings, *Chenango Textile Corporation* v. *Commissioner,* 148 F. (2d) 296 (C. C. A. 2, 1945); *Levitt & Sons* v. *Nunan,* 142 F. (2d) 795 (C. C. A. 2, 1944); *Harbor Plywood Corporation* v. *Commissioner,* 143 F. (2d) 780 (C. C. A. 2, 1944); *Estate of C. K. Lueders, et al.* v. *Commissioner,* 164 F. (2d) 128 (C. C. A. 3, 1947); *Commissioner* v. *Estate of F. M. Singer, et al., supra.* Indeed, any other course would

virtually create administrative finality for Tax Court decisions and make any judicial review a mere form.

In this case, the intent of the grantor is the determining factor under the statute, yet the Tax Court's findings of fact and opinion (R. 226-229) does not contain a single finding as to intent. The evidence on that subject was neither sifted, weighed nor found. It was simply brushed aside. The Tax Court's limited findings, with the minor exceptions of the finding as to the total value of the grantor's estate in 1930 and the finding as to the actuarial appraisal, as of the date of her death, of the likelihood that the trust property would be distributable pursuant to the residuary clause of her will, completely ignored all of the testimony and the documentary evidence presented on behalf of the petitioners. The observation in *Harris* v. *Commissioner*, 140 F. (2d) 809 (C. C. A. 2, 1944), although involving a different question of law, is apt:

> "Such a finding (of the grantor's intent) properly supported by the evidence would of course be a sufficient basis for the decision it made. In the absence of such a finding, however, the decision is erroneous." (Parenthetical matter supplied.)

It was error on the part of the Tax Court to fail to make complete findings of fact with respect to the intent of the grantor and to reach a conclusion which at most can be regarded as based upon an arbitrary assumption of intent directly contrary to that established by the proofs. These errors were not corrected, as they should have been, by the court below and review here is necessary to correct them, especially as some of the same questions are to be considered in other cases.

SPECIFICATION OF ERRORS

1. The court below erred in affirming the judgment of the Tax Court and in holding that there exists a deficiency in estate tax with respect to this estate in the amount of $669,950.89.

2. The court below erred in holding that the transfer in trust of March 10, 1930 was taxable under Section 302 (c) of the Revenue Act of 1926.

3. The court below erred in not remanding this case to the Tax Court for proper findings of fact.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decision below appears to be erroneous and seems to be in conflict with the decision of the Third Circuit in the Church case in which certiorari has been granted and, in which, furthermore, other questions which are also involved here will be considered on reargument. Furthermore, proper implementation of the rule in the *Dobson* case requires that, in this case, the failure of the Tax Court to make adequate findings to permit efficient review, should not be allowed to pass unnoticed. Otherwise the Tax Court may be encouraged to shirk its duty with respect to evidence offered before it and increase the burdens of reviewing courts or make them mere rubber stamps.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Second Circuit, in accordance with the

practice of this Court, and that a hearing upon and determination by this Court of the matters presented be had.

Dated, July 20, 1948

Respectfully submitted,

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1926

(In Force on March 10, 1930)

"Sec. 302. The value of the gross estate of decedents shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title:

REGULATIONS 105

(1941 Provisions)

Sec. 81.17. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. In such instances, it is immaterial whether the decedent's interest arose by implication of law or by the express terms of the instrument of transfer. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in

remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of Section 81.11, adjustments in the values of such transferred estates may be required. (See Section 81.15.)

Sec. 81.18. *Transfers with possession or enjoyment retained.*—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces (section 811 (c) all property transferred by the decedent, whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

(1) At any time after 10:30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

The use, possession, right to the income, or other enjoyment of the property will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate.

"Sec. 81.19. *Transfers with right retained to designate who shall possess or enjoy.*—The Internal Revenue Code (section 811(c) provides that, except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate shall embrace all property transferred by the decedent, whether in trust or otherwise, if there is retained by or reserved to him for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period, or for a period not ascertainable without reference to his death, the right either alone or in conjunction with any other person or persons to designate the person or persons who shall possess or enjoy the transferred property, or the income thereof.

This provision of the Internal Revenue Code covers, in the main, transfers to which also apply the provisions of certain other subsections of section 811. Thus, to the extent that the enjoyment of the transferred property is subject to any change through the exercise of a power by the decedent alone or in conjunction with any other person or persons to alter, amend, revoke, or terminate, the provisions of section 811(d) and of section 81.20 will apply. Or if the decedent reserved to himself a general power of appointment and the property passed in his lifetime or by his will pursuant to the exercise of such power, the property may be required by section 811(f) to be in-

cluded in the gross estate, and in such case the provisions of section 81.24 will apply without regard to when such power was created.

A transfer of the kind dealt with in this section, when not also falling within the provisions of some other subsection of section 811, requires the inclusion of the transferred property within the gross estate, if the transfer was made—

(1) At any time after 10:30 p.m., eastern standard time, March 3, 1931, and the right to so designate was retained by or reserved to the decedent alone for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p.m., eastern standard time, June 6, 1932, and the right to so designate was retained by or reserved to the decedent alone or in conjunction with any other person or persons for decedent's life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period, or for any period not ascertainable without reference to his death.

If the retention or reservation of the right described pertains to a part only of the transferred property, or to a part only of the income therefrom, then only a corresponding proportion of the value of the transferred property is includible in determining the value of the gross estate.

The right to so designate will be treated as having been retained or reserved if at the time of the transfer there was an understanding, either express or implied, that such right would later be created or conferred.

INDEX.

CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 170

ESTATE OF FLORENCE ALTHEA GIBB, Deceased, ALTHEA GIBB HUNTER, MALCOLM DU BOIS HUNTER and CHARLES S. MCVEIGH, Executors, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 222-229) is reported in 6 T.C. 1088. The *per curiam* opinion of

the Circuit Court of Appeals (R. 242) is reported in 167 F. 2d 633.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 23, 1948. (R. 243.) The petition for a writ of certiorari was filed on July 21, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a transfer in trust, made on March 10, 1930, was intended to take effect in possession or enjoyment at or after the grantor's death within the meaning of Section 811(c) of the Internal Revenue Code where the decedent retained the income for life and a contingent reversionary interest in the corpus.

STATUTE AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*, pp. 16-19.

STATEMENT

The facts found by the Tax Court (R. 223-226), taken chiefly from a stipulation of facts filed by the parties (R. 16-51), may be summarized as follows:

Florence Althea Gibb (hereinafter called the "decedent") was born on October 7, 1864, and died May 17, 1941, a resident of Nassau County,

New York. Her daughter, Althea Gibb Hunter, was born on November 18, 1892, and is the mother of four children born on the following dates:

Mary Althea Eldredge, April 6, 1919
Elaine Gibb Eldredge, April 6, 1919
Edward Irving Eldredge, March 31, 1921
Florence Hunter, May 5, 1928

Decedent's daughter and granchildren survived her and since decedent's death four children of decedent's grandchildren have been born and are now living. (R. 223.)

Althea Gibb Hunter (decedent's daughter), Malcolm DuBois Hunter and Charles S. McVeigh are the executors of the decedent's estate. As such, they filed an estate tax return for the decedent's estate which did not include the value of a trust created by decedent on March 10, 1930, for the future benefit of her daughter and the daughter's descendants. The Commissioner determined a deficiency based on the inclusion of the entire value of the assets of this trust in the decedent's gross estate. (R. 223, 226.)

In 1930, the year in which the decedent created this trust, the value of her estate was approximately \$10,000,000. (R. 226.) The value of the trust on the date it was created was approximately \$1,000,000 and the value of the corpus on the date of decedent's death was \$1,106,190.57. (R. 223-224.)

The deed of trust executed by the decedent on March 10, 1930, transferred certain property to the Brooklyn Trust Company as trustee to be held and administered as provided by the terms of the deed of trust. (R. 223.) The trust instrument (R. 39-49), after providing that the income be paid to the grantor for life, continued as follows (R. 40-41):

> 1. Upon the death of the Grantor the Trustee shall continue to hold the Trust Estate in trust for and during the lifetime of the Grantor's daughter ALTHEA GIBB HUNTER, and shall collect and receive the said interest, dividends, profits and income and after paying thereout all the costs, charges and expenses of whatsoever kind and nature incurred in the maintenance of the Trust Estate, shall pay over the net income to said Althea Gibb Hunter for and during the term of her natural life and upon her death the Trustee shall transfer, pay over and deliver the Trust Estate to the issue of the said Althea Gibb Hunter who shall survive her, their heirs, executors, administrators and assigns, in equal shares per stirpes however and not per capita, absolutely and forever, and if the said Althea Gibb Hunter shall leave no issue who shall survive her, then and in that event, upon her death the Trustee shall transfer, pay over and deliver the Trust Estate to those persons or institutions and in the shares, proportions or amounts in which they would, in that event, be entitled to receive the same under and pur-

suant to the provisions of the Last Will and Testament of the Grantor which shall cover the disposition of her residuary estate under such conditions.

2. Upon the death of the Grantor, if the said Althea Gibb Hunter shall have predeceased her leaving issue who shall survive the Grantor, then and in that event upon the death of the Grantor the Trustee shall divide the Trust Estate into equal shares or parts, one share for each child of the said Althea Gibb Hunter who shall survive the Grantor and one share for the issue taken collectively of each child of the said Althea Gibb Hunter who shall predecease the Grantor, leaving issue who shall survive the Grantor, such division however to be made among the descendants of the said Althea Gibb Hunter who shall be alive at the time of the death of the Grantor, per stirpes and not per capita.

* * *

Three subparagraphs, numbered A, B and C, give further directions as to the disposition of the trust property in the event shares are set aside for Althea Gibb Hunter's children as provided in subparagraph 2, quoted above. Subparagraph A (R. 41-42) provides that any share set apart for a child of Althea Gibb Hunter "who shall be alive upon the date of this Indenture and who shall survive the Grantor" (R. 41) shall be held in trust during the child's lifetime, that the net income

from the share shall be applied for the child's benefit during his or her minority and thereafter paid to him or her for life, that upon the death of the child the share shall be paid over absolutely to such issue of the child as survive the child, that in default of such issue, the share shall be paid over absolutely to the issue of Althea Gibb Hunter who survive such child and that (R. 42):

> in default of such issue the Trustee shall upon the death of such child transfer, pay over and deliver such share to those persons or institutions and in the shares, proportions or amounts in which they would, in that event, be entitled to receive the same under and pursuant to the provisions of the Last Will and Testament of the Grantor which shall cover the disposition of her residuary estate under such conditions.

Subparagraph B provides that any share set apart for a child of Althea Gibb Hunter who shall not be in being upon the date of the trust indenture but shall be born thereafter and shall survive the decedent shall, at the decedent's death, be transferred outright to the child for whom the share is set apart. (R. 42.) Under subparagraph C absolute delivery is also to be made at the decedent's death as to each sub-share set apart for a descendant of any child of Althea Gibb Hunter who shall die after the date of the trust indenture and be-

fore the date of the decedent's death leaving issue who survive the decedent. (R. 42.)

The trust instrument contains no provision for disposition of the trust property at the decedent's death in the event the decedent's daughter, Althea Gibb Hunter, and her descendants all predecease the decedent.

The decedent executed a number of wills. In none of them was any reference made to the indenture of trust or the power of appointment referred to in the indenture of trust.[1] One of these wills was executed prior to the date of the creation of the trust. (R. 225.)

In the decedent's last will and testament, dated January 17, 1938, the decedent's disposition of her residuary estate was substantially similar to the provisions for disposition after her death of the property she transferred in trust on March 10, 1930. (See paragraph Twelfth of will, R. 21-25, summarized in the Tax Court's findings of fact, R. 225.)

The theoretical value at the time of decedent's death of the possibility that the trust property should be distributable pursuant to the residuary

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[1] However, in four of the wills, the decedent's residuary estate was stated to include property "over which I [the decedent] shall at the time of my death have power of appointment" (R. 92, 119, 147, 174) and in the two most recent wills the residuary estate was stated to include property "over which I have or shall have at the time of my death any power of appointment" (R. 21, 201).

clause of her will, as computed by a qualified actuary using the Actuaries, or Combined Experience Table of Mortality, with four percent interest, was $1,070.79. (R. 226.)

On the basis of these facts the Tax Court held that the transfer in trust dated March 10, 1930, was one intended to take effect in possession or enjoyment at or after the decedent's death within the meaning of Section 811(c) of the Internal Revenue Code. (R. 226-229.) The Circuit Court of Appeals affirmed. (R. 242.)

ARGUMENT

Both the Tax Court and the Circuit Court of Appeals correctly held that this case is controlled by *Fidelity Co.* v. *Rothensies,* 324 U. S. 108. In that case, the decedent had created a trust to pay the income to the settlor during her life and at her death to her two daughters during their respective lives. At the death of each daughter the corpus supporting her share of the income was to be paid to her descendants. If both daughters died without leaving surviving descendants, the corpus was to be paid to such persons as the settlor might appoint by will. This Court, utilizing the principles set forth in *Klein* v. *United States,* 283 U. S. 231, and *Helvering* v. *Hallock,* 309 U. S. 106, held the full value of the corpus includible in the grantor's gross estate as a transfer intended to take effect in possession or enjoyment at or after

the grantor's death under Section 302 (c) of the Revenue Act of 1926, which has been carried forward into Section 811(c) of the Internal Revenue Code (Appendix, *infra*). In so holding the Court said (pp. 111-112):

> It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant to the measurement of estate tax liability. The application of this tax does not depend upon "elusive and subtle casuistries." *Helvering* v. *Hallock*, *supra*, 118. No more should the measure of the tax depend upon conjectures as to the propinquity or certainty of the decedent's reversionary interests. It is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries. The value of the property subject to the contingency, rather than the actuarial or theoretical value of the possibility of the occurrence of the contingency, is the measure of the tax. That value is demonstrated by the consequences that would flow in this instance from the decedent's survival of her daughters and any of the latter's surviving descendants.

The facts of the instant case are strikingly similar to those in the *Fidelity Co.* case and there is no material distinction. Therefore, there is no basis for certiorari. And see *Commissioner* v.

Estate of Field, 324 U. S. 113; *Goldstone* v. *United States,* 325 U. S. 687; *Eldredge* v. *Rothensies,* 150 F. 2d 23 (C. C. A. 3d), certiorari denied, 326 U. S. 772.

In support of their application for certiorari, the taxpayers urge (Pet. 6, 12-13) that the *Fidelity Co.* case is distinguisable because there no children were born to the daughters until after the grantor's death and the grantor exercised her power of appointment. But such distinctions are plainly immaterial because they do not detract from the basic considerations that here, as in the *Fidelity Co.* case, all the provisions for distribution of the corpus were made with reference to the grantor's death and the grantor specifically retained a reversionary interest, thus holding in suspense and delaying until her death or thereafter the ripening of full dominion over the property by the beneficiaries. Similar distinctions were unsuccessfully urged by the taxpayers in the *Eldredge* case, *supra,* where the tax was sustained and certiorari was denied.

The taxpayers also contend (Pet. 6-10) that the instant decision conflicts with the decision of the Third Circuit in *Commissioner* v. *Estate of Church,* now pending before this Court, No. 5, October Term, 1948; and they say that since this Court has ordered reargument of that case and the *Spiegel* case (*Estate of Spiegel* v. *Commissioner,* No. 3, October Term, 1948) and has requested discussion

of certain questions, including the question whether *May* v. *Heiner,* 281 U. S. 238, and *Hasset* v. *Welch,* 303 U. S. 303, can continue to stand in the light of subsequent authority, therefore certiorari should be granted not only to resolve the conflict but to present other facets of the important questions upon which this Court has requested reargument. But plainly the taxpayers are in error and there is no such conflict with the *Church* case as would make it necessary or advisable for this Court to grant certiorari here. In the *Church* case, the grantor did not expressly retain a reversionary interest in the corpus and the basic question presented in that case is whether a possibility of reversion by operation of law is as effective as one expressly reserved to support taxability. A subsidiary question presented is whether under the *Dobson* rule (*Dobson* v. *Commissioner,* 320 U. S. 489), the Circuit Court of Appeals had power to reverse the Tax Court's decision. In the instant case it is true that there was a possibility of reversion by operation of law if the grantor survived all the beneficiaries, and indeed the Circuit Court of Appeals noted this by citing the *Bayne* case (*Commissioner* v. *Bayne's Estate,* 155 F. 2d 475 (C. C. A. 2d)) in its *per curiam* opinion; but as stated above, this was not the only string on the corpus that the grantor kept: here there was the express retention of a contingent power of appointment which brings the case directly within

the scope of this Court's decision in the *Fidelity Co.* case. Hence there is no necessity here to go into the problems peculiar to the *Spiegel* and *Church* cases where there was no explicit retention of a reversionary interest.

The taxpayers present (Pet. 10-13) an erroneous contention to the effect that nothing passed from the grantor at death. This ignores the fundamental consideration, recognized by the Tax Court (R. 228), that up to the time she died the decedent could have changed her will so as possibly to affect the devolution of the trust property. Her death cut off that possibility. This is enough to satisfy the requirement of *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 348, that something must pass from the decedent at death; and in the *Fidelity Co.* case it was expressly so held. See 324 U. S. at p. 111.[2] It is of no moment whether the interests of the beneficiaries were vested or contingent so long as there was a possibility of reversion or control. *Commissioner* v. *Estate of Field,* 324 U. S. 113, 116. We need not here go into decisions of the lower courts such as *Commissioner* v. *Singer's Estate,* 161 F. 2d 15 (C. C. A. 2d),

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[2] This Court there said:

> The retention of such a string, which might have resulted in altering completely the plan contemplated by the trust instrument for the transmission of decedent's property, subjected the value of the entire corpus to estate tax liability.

cited by taxpayers. (Pet. 10, 11, 13, 14.) If it be considered that the *Singer* case is to any extent at variance with the *Fidelity Co.* case or the instant one, it should of course to that extent be disregarded as erroneous.

The taxpayers say (Pet. 14-16) that taxation should not depend upon the existence of a remote possibility of reversion by operation of law and that is the basic issue presented to this Court in the *Spiegel* and *Church* cases. But as above pointed out, there was more than that here. Here we have the explicit retention of a contingent power of appointment which brings this case precisely within the ambit of the *Fidelity Co.* decision and there is no need to consider any additional grounds for taxability.

On pages 16-18 of their application for certiorari, the taxpayers assert that the Tax Court erred in not making findings with respect to the decedent's actual intent, rather than her intent as reflected by the terms of the trust instrument. The testimony before the Tax Court, as we view it, is not inconsistent with the decedent's intent as expressed in the trust instrument (see R. 59, 61, 63, 66, 69, 76-78), but the testimony is in any event irrelevant. It is the inescapable rationale of this Court's decisions that an objective, rather than a subjective, standard of intent is envisaged by Section 811 (c). We submit that the Tax Court in the instant case made no error in this connec-

tion. It carefully considered the evidence adduced and concluded (R. 227-228)—

> that the decedent was fully aware of the provisions of the trust instrument and by executing the instrument approved those provisions; in other words, we think that the intention of the grantor must be gathered from the words of the trust instrument.

Moreover, taxpayers' argument is without foundation. In all of these cases where the ultimate disposition of the trust property must await the death of the grantor, the transfer is necessarily intended to take effect in possession or enjoyment at or after the grantor's death as a matter of fact. And indeed this was recognized by this Court in *Reinecke* v. *Northern Trust Co., supra,* 278 U. S. at p. 347. The only question at issue is whether it was so intended as a matter of law. And certainly where, as here, the grantor reserved the income for life and had a reversionary interest in the corpus, it was impossible for anybody except herself to obtain full dominion over the property until after she died. We submit that there is no plausible or consistent basis for any argument that she did not intend the result that was actually achieved. In view of the foregoing it is plain that the Tax Court made no error in either its findings or its conclusion in this case.

CONCLUSION

The decision is correct; there is no essential conflict; the petition should be denied.

Respectfully submitted,

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THERON LAMAR CAUDLE,
Assistant Attorney General.

GEORGE A. STINSON,
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L. W. POST,
Special Assistants to the Attorney General.

August, 1948.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * *

(26 U.S.C. 811)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.17 [as amended by T. D. 5512, 1946-1 Cum. Bull. 264]. *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if—

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event

or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

*   *   *   *

Example (5). The decedent transferred property in trust retaining a life estate and giving a succeeding life estate to another, with the remainder to such succeeding life tenant's issue who survived both the decedent and the life tenant. The decedent also retained the power to designate who shall take the remainder in case the succeeding life tenant died without surviving issue. Here, possession or enjoyment of the property can be obtained by the succeeding life tenant and by the succeeding life tenant's issue only if they survive the decedent; thus satisfying requirement (1). Requirement (2) is also satisfied with respect to the interests of both beneficiaries since the decedent retained a right in the entire property, i.e., a contingent power of appointment. The entire value of the property, including the value of the succeeding life

estate and the remainder is, therefore, includible in the decedent's gross estate.

*   *   *   *

Example (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

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